In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1201

JOSEPH DECESARE AND RALPH BLACKBURN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted under an information which charged them with violating 26 U.S.C. 7203 by willfully failing to purchase the occupational tax stamp required by 26 U.S.C. 4411 and by willfully failing to register as required by 26 U.S.C. 4412 (R. 1). Each was sentenced to imprisonment for six months (R. 25-26), and the court of appeals affirmed.

The evidence showed that petitioners were engaged in the wagering business between March 1 and March 24, 1964 (R. 100-111, 255-258, 273-283), and that, on the latter date, federal agents executed a search warrant at the premises where the business was conducted (R. 119-121). Subsequently, on March 30, 1964, petitioner Blackburn registered and paid the wagering occupational tax (R. 287). On October 7, 1964, petitioner DeCesare registered and paid the occupational tax for a subsequent tax period (R. 308).

There is no merit to any of the questions raised by petitioners.[1]

1. The proper venue of the crime charged was not the residence of petitioners, but the place where petitioners failed to do the required acts. *Johnston* v. *United States*, 351 U.S. 215, 220; *United States* v. *Commerford*, 64 F.2d 28, 32-33 (C.A. 2), certiorari denied, 289 U.S. 759.

2. Although at the trial petitioners' counsel conceded that they were "bookies" (R. 345), they contend that there was insufficient evidence from which the jury could have inferred that they knew of their legal obligation to register and file a tax return. As "bookies", petitioners were intimately connected with betting and presumably well aware of the tax

[1] Petitioners do not present the issue which is before this Court in *Costello* v. *United States*, No. 826, this Term, *i.e.*, whether the occupational tax stamp provision of 26 U.S.C. 4411 and the registration provision of 26 U.S.C. 4412 violate the privilege against self-incrimination. Unlike Costello, petitioner Blackburn belatedly registered and paid the tax.

obligations imposed on wagering. In addition, the evidence showed that they attempted to destroy their records upon learning that federal officers were at the premises (R. 207-208, 218-220). In these circumstances there was sufficient proof of willfulness to support the jury's verdict. Significantly, petitioners did not raise this issue in the trial court by moving for judgment of acquittal. Rule 29, F.R. Crim. P.[2]

3. Contrary to petitioners' contentions, the officers complied with 18 U.S.C. 3109 in executing the search warrant. The officers first identified themselves and their purpose. It was only after they smelled smoke and heard movements that they broke open the door to prevent the destruction of the objects sought under the warrant (R. 138-141, 148-152, 156-159). As stated in *Masiello* v. *United States*, 317 F.2d 121, 122 (C.A. D.C.):

> * * * But the phrase, "refused admittance" is not restricted to an affirmative refusal. Indeed it would be an unusual case coming before the courts where an occupant affirmatively "refused admittance" or otherwise made his refusal known verbally after being given notice pursuant to § 3109. Where, as here, after giving the required notice the officers hear sounds which indicate to them that the evidence sought by the warrant may be in process of destruction, execution of the warrant need not be deferred long enough to allow completion of the process.

[2] At the close of the evidence Blackburn did, however, seek dismissal on the ground of his belated registration and payment of the tax (R. 295-299).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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